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No. 92-2069

In The

Supreme Court of the United States

October Term, 1993

JAMIE MARIE PRAYSON, *et al.*,

Petitioners,

vs.

KANSAS CITY POWER & LIGHT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT P. GINGRICH*
DEREK E. WOOD
KANSAS CITY POWER & LIGHT COMPANY
1201 Walnut Street, 20th Floor
Kansas City, Missouri 64106
Telephone: (816) 556-2793
Fax: (816) 556-2787
*Counsel of Record

Counsel for Respondent
Kansas City Power & Light Company

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent respectfully suggests that the issue framed by petitioners is more correctly stated as follows:

> Do the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit retroactive application of a Missouri Supreme Court decision (which changed Missouri's tort law), the effect of which was to reverse a non-final judgment entered on a jury verdict awarded in petitioners' favor in a wrongful death case prior to the date of the decision which was applied retroactively?

RULE 29.1, STATEMENT

Respondent Kansas City Power & Light Company, a Missouri corporation, is not a subsidiary corporation of any other corporation and all of its subsidiary corporations are wholly owned by Kansas City Power & Light Company, with the sole exception being the Wolf Creek Nuclear Operating Corporation.

REASONS FOR DENYING THE WRIT

I. **In *Harper v. Virginia Department of Taxation*, 61 U.S.L.W. 4664 (June 18, 1993) this Court held that nothing in the United States Constitution prohibits the retrospective application of judicial decisions, which has been a fundamental rule of law for nearly a millennium. Indeed, it further held that when it applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and *must be given full retroactive effect* in all cases still open on direct review *and as to all events*, regardless of whether such events predate or post-date the announcement of the rule and notwithstanding the fact that such rule is contrary to existing precedent on which parties may have relied or establishes a new principle of law not clearly foreshadowed by previous authority. In so doing, it further held that neither it nor any other federal court had the authority to apply such a rule only prospectively, thus effectively overruling *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), the case upon which petitioners principally rely in seeking a writ of certiorari. As it is clear that nothing in the United States Constitution prohibits retrospective application of federal judicial decisions concerning federal law, it is equally clear that nothing in the United States Constitution prohibits retrospective application of state judicial decisions concerning state law. Accordingly, petitioners do not present a question of federal law and the Court lacks jurisdiction in the premises.**

"Nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.' *Kuhn v.*

Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)." *Harper, supra* at 4666.

The week before the petition for certiorari in this case was filed, the Court held that federal courts applying federal law are *required* to give retroactive effect to the decisions of the Court. Although no fifth or fourteenth amendment due process or equal protection arguments *per se* are addressed in *Harper, supra* the Court very plainly stated that *selective application of new rules* violates the principle of treating similarly situated parties the same.

More might be said in opposition to the petition. The length of this Brief could be considerably extended. For example, detailing how petitioners knew from the date six years ago when respondent filed its *first motion to dismiss* showing that thirteen (13) other states had all uniformly rejected the theory under which this case had been filed, and how petitioners nevertheless stubbornly pursued this litigation in the face of overwhelming contrary legal authority from *every other state*, just as they now are pursuing a petition for certiorari in this Court in the face of obvious controlling authority to the contrary, could consume several pages.

In view of the Court's holding in *Harper* that retroactive effect is *required* to be given to Supreme Court decisions in federal courts applying federal law, arguing that the due process and equal protection clauses *prohibit* state courts from giving retroactive effect to the decisions of

their Supreme Court is preposterous. The prudent use of the Court's time dictates terminating this Brief anon.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Missouri Court of Appeals, Western District should be denied.

Respectfully submitted,

ROBERT P. GINGRICH*
DEREK E. WOOD
KANSAS CITY POWER & LIGHT COMPANY
1201 Walnut Street, 20th Floor
Kansas City, Missouri 64106
Telephone: (816) 556-2793
Fax:(816) 556-2787

*Counsel of Record